UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10

BMW MANUFACTURING CO. **AND** **INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA**	**NLRB Case No.: 10-CA-178112**

RESPONDENT'S REPLY BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISIONS OF THE ADMINISTRATIVE LAW JUDGE

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Pursuant to Section 102.46 of The National Labor Relations Board's Rules and Regulations, BMW Manufacturing Co. ("Respondent") Submits This Brief In Reply to The Counsel for the General Counsel's Answering Brief:

I. INTRODUCTION

On December 28, 2017, Respondent, BMW Manufacturing Co. ("BMW MC" or "Respondent"), filed its exceptions to the Administrative Law Judge ("ALJ") decision issued in this matter on December 1, 2017. Respondent set forth therein the numerous factual and legal issues with the ALJ's findings. Counsel for the General Counsel ("GC") responded with an Answering Brief filed on March 9, 2018, which attempted to justify the erroneous rulings of the ALJ. For the reasons set forth below, the Brief filed by the GC does not provide factual or legal justification for the Board to uphold the invalid and inaccurate decision of the ALJ which is not supported by the evidence or applicable law.

II. THERE IS NO BASIS FOR FINDING THAT MANAGERS CREATED THE UNLAWFUL IMPRESSION OF SURVEILLANCE

The GC correctly asserts, "[W]hen an employer's agent tells employees that it learned of their union activities from another employee, or when those activities are overt such that employees would not reasonably conclude that the employer learned of them through surveillance, the Board has found no violation [of the law]." GC Br. 18 (citing *RCC Fabricators, Inc.*, 352 NLRB 701, 702 (2008))[1]. However the GC then makes arguments inconsistent with this statement and other governing Board law in an effort to justify the ALJ's bizarre finding on the record in this case that managers created an impression of surveillance. Even if the evidence relied upon by the ALJ is credited, this finding is based on alleged comments about a rumor that was so widespread

[1] Although *RCC Fabricators* was abrogated by *New Process Steel v. NLRB*, it cites to the still valid decision of *Park 'N Fly, Inc.*, 349 NLRB 132 (2007), for the stated proposition.

that a local television station called seeking comment from the company and alleged comments regarding a picture of a well-known and open union supporter with a bullhorn standing in front of the plant gate used by thousands of employees, supervisors, and managers each day.

Like the ALJ's decision, the GC's brief also misapplies *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270 (2005). In addressing the issue of surveillance in a similar context—a Yahoo! internet page dedicated to discussions about the union and other employment issues—the Board considered whether an employee would have reasonably assumed from a manager's comment about the page that union activities were being surveilled. The manager had obtained information about the Yahoo group when an employee showed him one of the posts and then emailed him a copy. *Id.* The Board found that a reasonable employee would assume the manager learned of the post "exactly the way [the manager] did—through public dissemination by another website subscriber." *Id*. at 1276. The Board came to this conclusion based on testimony similar to that elicited in this case. There, the Board considered evidence that a page member could not be sure the site was restricted only to the potential union members; here, Lawter and Pearson testified to the same issue. The GC even states, "There was no evidence presented that administrators of the Facebook page can monitor whether, or even who, accesses the page." GC Br. 13. Lawter and Pearson did testify about a vetting process to add members, but there was no evidence that the non-administrator "reasonable employee" would have these additional indications of privacy. Even if they did, such restrictions on membership then cut the other way, making it less reasonable that a manager was able to personally view the site. *See, 2010* GCM LEXIS 51 (finding that because employee "had restricted access to her friends, she would not reasonably conclude that her employer was directly monitoring her Facebook page"). This is

particularly true where Kirby explicitly told Pearson that he had not visited the site after Pearson accused him of doing so. Pearson does not contest Kirby denied seeing the site.

In *Frontier*, there was no evidence of anything written on the website indicating it was restricted to potential union members only; no such evidence of a written notice of restriction was offered here either. The GC claims that the Car Mill site "contains specific statements that the site is not open to supervisors and managers, is designated as 'secret,' and prospective members are subjected to several levels of vetting before admission to the site." GC Br. 20. The GC provides no record cites for these assertions of statements displayed on the Car Mill because no such evidence was introduced at the hearing. The GC cannot now assert such factual issues without record support. Further, the GC presented two witnesses who said they were administrators on the Car Mill site, but neither offered this evidence, despite them being in the best position to do so. Thus, the only logical conclusion is that no such evidence exists.

The Board also noted that there was no publicized requirement that members keep the site's existence a secret in *Frontier*. Again, in this case, there is likewise no evidence that the site's existence was a secret. Finally, in *Frontier*, evidence showed that any subscriber to the website could show posts to anyone else. Lawter testified that he knew that it was possible for a member of the Car Mill site to show a manager information posted there. (Tr. 139). Under the analysis set forth in *Frontier*, it is unreasonable to conclude that Epps' alleged comment about the Car Mill site unlawfully created the impression of surveillance. Epps allegedly commented that managers had seen Car Mill posts. Lawter testified that there were only two ways for a manager to see the site: (1) an employee showed them or (2) the manager created a fake profile. Lawter then testified he was not aware of any managers who had created fake profiles to get on the Car Mill site and that Epps did not imply he had been on the site. (Tr. 139-40, 147-48). The only reasonable

conclusion was that an employee shared the site's content. Even assuming *arguendo* that Epps made the comments described by Lawter, Epps acknowledging information that another employee chose to make public does not create an unlawful impression of surveillance. *See Frontier Telephone*, 344 NLRB at 1276.

Similarly, a reasonable employee would not conclude from Kirby's alleged comments that he was surveilling union activity. The ALJ based her ruling on this issue on the testimony she credited that Kirby commented to Pearson that the Union was spreading lies about Rich Morris on the Car Mill site and created the impression that he had seen other posts. ALJD 17, 38-43[2]. Even the GC admits that the rumor regarding Rich Morris was publically known. GC Br. 21. The rumor was so widely known, in fact, that a local news station reached out to Respondent for public comment. Tr. 263-64, 269. It is entirely unreasonable to conclude that the only place that Kirby could have learned about these rumors was the Car Mill site and that by commenting about the Morris rumors there was any basis for Pearson to believe that he had been on the Car Mill site. *See RCC Fabricators, Inc.*, 352 NLRB 701 (2008) (finding no violation of the Act where supervisor asked about union meeting that was general topic of discussion in the plant). This conclusion is so unreasonable that even the ALJ contradicts herself in her decision[3]. Even

[2] Respondent challenges the ALJ's factual determinations regarding the credibility of Pearson's unwieldy testimony. The GC seeks to minimize the blatant flaws in the ALJ's fact finding. But Respondent has shown in its Memorandum in Support of Exceptions to the ALJ's Decision that the ALJ improperly credited many of the GC witnesses, either by blatantly ignoring contradictory testimony by them or by improperly crediting a witness when two or more witnesses' testimonies contradict the testimony of the first. As pointed out in Respondent's Post-Trial brief to the ALJ, Pearson inconsistently testified about, *among other things*: (1) his and Kirby's opening comments in the upstairs meeting (Br. 24-25, Tr. 164-65); (2) whether he was loud in the meeting (Br. 24-25); (3) what sparked him to ask Kirby about the Car Mill site (Br. 26-27, Tr. 167-169); (4) whether he was the first person walking to HR (Br. 28); (5) who spoke first one in HR (Br. 28); (6) when Kirby made a statement about being intimidated (Br. 28); and (7) whether he had been granted permission to distribute union literature in the KPlatz (Br. 27). Pearson's incongruous testimony should not be credited. *See Fred'k Wallace & Son, Inc.,* 331 NLRB 914, 917 (2000) ("When a party's story keeps changing, it is perfectly appropriate for the finder of fact to conclude that none of the various versions are true.").

[3] The ALJ first acknowledges the rumors were all over the plant floor, stating, "Treadwell's testimony that he had not heard about the Morris rumors at all before the meeting with Pearson and Kirby is equally doubtful." ALJD p. 16, lines 12-14. However, she then states, "I have not credited Kirby's testimony that he heard about the rumor on the floor." *Id*. p. 19, lines 23-24.

assuming *arguendo* that the ALJ's factual findings are correct, Kirby's comment about a publicly known issue cannot create an impression of surveillance. *See Id.*

The same is true of the alleged comment by Kirby about seeing Pearson with a bull horn. Pearson admitted that he openly stood out in front of Respondent's facility with a large union sign and a bull horn. The GC rightfully concedes that such overt union activity is public information. GC Br. 21. Again, any comment Kirby made about such incidents cannot link him to being on the Car Mill site and cannot create an impression of surveillance. *See, e.g., Wal-Mart Stores, Inc.*, 350 NLRB 879, 905 (2007) (finding that the employer did not create the impression of surveillance by observing union activity that consisted of "conspicuously standing in front of the employer's premises). *See also, Intertape Polymer Corp. v. NLRB*, 801 F.3d 224, 235 (4th Cir. 2015); *Belcher Towing Co. v. NLRB*, 726 F2d 705, 709 (11th Cir. 1984); *Emenee Accessories, Inc.*, 267 NLRB 1344, 1344-1349 (1983); *Milco, Inc.*, 159 NLRB 812, 814 (1966).

Finally, the GC stresses that Kirby made comments about Car Mill administrators that he could not have known without visiting the site himself. First, Kirby and Treadwell deny that any such comment was made. Pearson was not consistent in his testimony regarding this issue either. The ALJ first notes, "Pearson testified that Kirby questioned why they had a site administrator who never came to work." ALJD p. 12, lines 18-19. However, on the very next page, the ALJ quotes Pearson's email to Union Organizer Brad Bingham (which she credits in her decision). The email states, "Kirby also told me that if we wanted the union in we'd better pic [sic] new spokesman because one of the one [sic] we had was riding the system and that that's what uaw was consistent with helping workers to get paid to doing [sic] nothing." ALJD p. 13, lines 29-32 (emphasis added). Thus, even the ALJ's decision shows that Pearson did not consistently testify that Kirby made remarks about "an administrator," but rather that Kirby's alleged remark was

about a known union supporter. *See Flagstaff Medical Center*, 357 NLRB No. 65 (2011), *enf'd,*715 F.3d 928 (D.C. Cir. 2013) (no unlawful impression of surveillance where supervisor stated to well-known union proponent that everyone knew she was a "pusher"); *Professional Medical Transport*, 346 NLRB 1290, 1292 (2006) (no basis for finding that employer had created impression of surveillance when employee's union support was "common knowledge"); *Kathleen's Bake Shop, LLC*, 337 NLRB 1081, 1081 (2002) (no impression of surveillance where employee had been "openly identified as a union supporter" and supervisor's statements "expressed that which had been well known").

While the ALJ mentions that she credited Pearson's testimony that Kirby made a comment about administrators on the site, that alleged comment by Kirby was not the basis for the ALJ's decision. The ALJ emphasized the comments Kirby made about the Rich Morris rumor, using those comments to support her decision regarding the impression of surveillance charge. The GC now seeks to bolster a weak argument about an impression of surveillance with evidence that was not emphasized either at the hearing or in the ALJ's decision and which is based on testimony that is inconsistent at best. Further, the GC's argument ignores the undisputed evidence that Kirby explicitly denied having been on the Car Mill site to Pearson. Pearson testified that Kirby expressly stated during this meeting that management had not been on the Facebook site but that associates had shared some of the information from that site with managers. (Tr. 190). It is illogical that the impression of surveillance could be created when *actual* surveillance is entirely disclaimed. Pearson also testified that Kirby said he had been told about certain things on the Car Mill site by other people. As the GC's brief acknowledges, "[W]hen an employer's agent tells employees that it learned of their union activities from another employee, … the Board has found

no violation [of the law]." GC Br. 18 (citing *See RCC Fabricators, Inc.*, 352 NLRB 701, 702 (2008)).

In light of the record evidence as well as established Board precedent, there is no basis for a finding that either Corey Epps or Chris Kirby unlawfully created an impression of surveillance of union activities. Thus, the ALJ's findings on all related issues should be overturned.

III. ALLEGATIONS RELATED TO RESPONDENT'S POLICIES

The ALJ's findings regarding Respondent's policies are based upon the Board's decision in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), which the Board recently overruled in *The Boeing Company*, 365 NLRB No. 154 (2017).[4] The GC concedes that the work rules regarding "threatening or offensive" language and prohibiting recording within the BMW MC facility may be found lawful under *Boeing.*

"In determining whether a work rule violates Section 8(a)(1), the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights." *Hyundai American Shipping Agency*, 357 NLRB No. 80 (2011). While the law states that the GC does not have to provide affirmative evidence to prove that employees were in fact chilled in their union activity, the law does not preclude consideration of evidence that employees were not chilled

[4] A challenge has been raised that Member William Emanuel should not have participated in the *Boeing* decision due to an alleged conflict of interest. Respondent asserts that even if *Boeing is vacated*, the rule announced in *Boeing* should be otherwise adopted by the Board as it is consistent with prior Board law. *See, e.g., Flagstaff Medical Center, Inc.*, 357 NLRB 659, 663 (2011) (noting the "weighty" interests associated with patient confidentiality); *GTE Lenkurt, Inc.*, 204 NLRB 921, 921-22 (1973) (upholding handbook provision limiting right of off-duty employees to be on employer's premises based on balancing Section 7 rights against the employer's private property rights); *Peyton Packing Co.*, 49 NLRB 828, 843 (1943) (upholding no-solicitation rule because employer's interest in production during working time outweighed Section 7 rights of employees to engage in solicitation). *See also NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967) (finding that the Board has the "duty to strike the proper balance between…asserted business justifications and the invasion of employee rights in light of the Act and its policy"); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 229 (1963) (discussing the balancing of "intended consequences upon employee rights against the business ends to be served by employer's conduct"); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-98 (1945) (finding there must be a "working out [of] an adjustment between the undisputed right of self-organization…and the equally undisputed right of employers to maintain discipline in their establishments").

in their union activities because of an employer rule. This evidence that employees' union activities were not chilled cuts against a finding that the rule "reasonably tend[s] to chill" union activity. Here, there is clear, undisputed evidence of union activity occurring openly at Respondent's facility. The work rules challenged by the GC have been in place throughout this time. Employees clearly have not been chilled in their exercise of Section 7 rights as they have openly engaged in solicitation, distributed union literature, worn union paraphernalia, engaged in pro-union discussions, established a volunteer organizing committee, spoken to the media, complained about terms and conditions of employment, carried pro-union signs, and handbilled, among other activities in support of the union. (Tr. 11, 152, 290-91). It is illogical to find that work rules maintained throughout the time these activities were openly occurring (without discipline by management) could *reasonably* have a chilling effect on protected activity. Finding the rules "chilling" without acknowledging the ongoing union activity views the rules in an isolated bubble not required by the Board.

Specifically, with regard to the solicitation policy, Respondent submits that *Boeing* requires a re-evaluation of prior precedent, such as *UPS Supply Chain Solutions, Inc.*, 357 NLRB 1295 (2011), and *Our Way, Inc.*, 268 NLRB 394 (1983). To the extent such prior cases have found that an unqualified right exists to engage in solicitation in working areas, during non-work time, these holdings should be re-examined according to the analysis of *Boeing.*

The NLRB has consistently found that a rule prohibiting distribution of literature in working areas is lawful because such a rule is justified by the employer's legitimate business need to maintain work areas free of litter. *See e.g. Stoddard-Quirk*, 138 NLRB 615 (1962). The same justification exists for solicitation, where union cards are being passed around for signatures. *See Conagra Foods, Inc.*, 361 NLRB No. 113, 2014 NLRB LEXIS 902, *7 (2014) (finding that the

presentation of an authorization card is "integral and important to the solicitation process"). Moreover, Respondent provides team areas and various other mixed use or non-working areas within the facility where solicitation can be done outside working areas. Thus, working areas are not the only place employees have access to within the BMW MC facility in which the union's purpose can be accomplished.

Boeing also controls the analysis of Respondent's workplace civility policy that Associates should "demonstrate respect for the Company." Because the rule does not explicitly prohibit Section 7 activity and in light of the fact that the rule has not been communicated or applied to prohibit such Section 7 activity, it is clearly lawful as a category 1 rule under the *Boeing* analysis. The same is true for Respondent's policy that Associates should not "engage in behavior that reflects negatively on the Company." In both cases, the Respondent has a legitimate business interest in protecting the brand it has spent many years building. (Tr. 247-50; Resp. Ex. 6). There is clearly a lawful purpose for the rules unrelated to prohibiting Section 7 activity. Thus, even if the rule were analyzed as a category 2 rule under *Boeing*, the legitimate business interests would clearly counterbalance any potential limitation on protected employee activities.

IV. ROGER YOUNGBLOOD DID NOT VIOLATE THE ACT IN HIS CONVERSATION WITH ASSOCIATES

The GC relies on testimony that Youngblood demanded to Gill, "Give me those papers," to support the claim that he unlawfully interrogated union supporters. But the GC ignores the fact that none of the witnesses knew what papers Youngblood was talking about. Quite the opposite—Gill, Deese, and Evans each stated that they did not know what Youngblood was talking about. (Tr. 30-31, 73, 94). There is no evidence that by asking about "papers", Youngblood was seeking information about union activities of employees. There is no possibility that the witnesses understood Youngblood to be asking about union related "papers" as they specifically denied that

they knew what type of "papers' he was asking about. Therefore, there is no basis for concluding that the conversation was a coercive interrogation.

As to the claim regarding Youngblood's alleged unlawful restriction on Gill's right to solicit, the law is clear that employees do not have the right to solicit during working time. *See, e.g., Peyton Packing Co.*, 49 NLRB 828, 843 (1943). The Board has "consistently held that solicitation for a union usually means asking someone to join the union *by signing his name to an authorization card at that time*" and that the presentation of an authorization card is "integral and important to the solicitation process." *Conagra Foods, Inc.*, 361 NLRB No. 113, 2014 NLRB LEXIS 902, *7 (2014) (emphasis added) (internal quotation marks omitted) (citing *W.W. Grainger, Inc.*, 229 NLRB 161, 166 (1977) and *Farah Mfg. Co.*, 187 NLRB 601, 602 (1970)). As Gill testified himself, he was told not to *solicit* during working time. (Tr. 45). This instruction does not violate the Act.

V. CONCLUSION

The ALJ's findings are clearly not supported by applicable law or the evidence presented in this matter and the Complaint should be dismissed.

Dated this 23rd day of March, 2018.

Respectfully submitted,

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AMENDED CERTIFICATE OF SERVICE

I, D. Christopher Lauderdale, hereby certify that on March 23, 2018, I submitted the **RESPONDENT'S REPLY BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISIONS OF THE ADMINISTRATIVE LAW JUDGE** to the Office of the Executive Secretary via the NLRB's E-filing Program and emailed a copy to:

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